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SUPREME COURT
OF THE UNITED STATES.

MAY TERM, 1923.

NO ~~xxx~~ ~~27~~ 34

FARMERS GRAIN COMPANY OF EMDEN, et al.,
Plaintiffs and Respondents,

vs.

GEO. F. SHAFER, as ATTORNEY GENERAL, et al.,
Defendants and Appellants.

Appellant's Brief.

GEO. F. SHAFER,
Attorney General,
State of North Dakota.
SETH W. RICHARDSON,
Special Ass't. Attorney General,
Fargo, North Dakota,
Attorneys for Appellants.

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STATEMENT OF FACTS.

The State of North Dakota has in general but one great commercial interest, to-wit, the production and marketing of its grain crop. The State is almost wholly agricultural, and the well-being prosperity and welfare of the State depends to a very great extent upon the financial returns from the grain crop. All of the investment of money, time and labor for the purpose of creating such crop is inevitably measured by the financial returns therefrom. The production of the crop is

individual, as well as the marketing of it, and in the last analysis, the individual stands alone in the final disposition of it.

It is at the local elevator point that the disposition of most of the grain raised is made, and it is, therefore, of the utmost importance that the maximum of protection be extended at *such marketing point* in order that the producer in particular be afforded fair treatment, and proper returns.

As is detailed in the answer to the order to show cause, the marketing of grain by the farmer is had during a short period of the year, and under circumstances affording him a minimum of opportunity for supervision of the physical sale of his crop. It is threshed on short notice, and the grain is rushed to the elevator immediately, usually by children, women, hired men, and the like, and the result has always been that the buyer at the local elevator was in peculiarly supreme control of all of the elements of the marketing of the grain.

We therefore see the vital importance of the grain-producing industry to the State of North Dakota, and also that the results therefrom to the producer are wholly dependent upon proper marketing conditions, and it therefore becomes peculiarly noticeable that the greatest industry of the State, and the necessary welfare and prosperity which should flow therefrom, is concentrated and placed in the hands of the *buyers of grain* at the *local marketing points.*

Human nature is the same in the grain business as in other lines of industry, and the result of

such uncontrolled power in the hands of the buyers of grain has resulted in a set of conditions throughout the grain-raising states which may properly be termed almost a national disgrace. Much, if not all, of the political and economic unrest through the agricultural sections of the country, particularly those largely engaged in the raising of grain, is due to the presence of evils flowing from the uncontrolled and unsupervised marketing of grain. The facts in this particular have been adverted to by the courts.

State v. Turner, 164 N. W., 925, 935.

Globe Company v. Andrew, 114 Fed., 871.

Various attempts have been made through legislation to counteract and minimize these evils. Among such attempts were grain inspection and grading laws passed in 1917, and again in 1919 by the Legislature of North Dakota.

The 1919 Grain Grading Act was a comprehensive measure covering the entire field of grain marketing, passed and enforced upon the *theory* that the same was *wholly within the absolute control of the State;* that *no part* of such marketing formed *any part* of any *interstate* transaction. The scope of this former act can be readily determined from its context, and a copy of such 1919 act is appended to this brief, and marked Exhibit A, for the convenience of the court. This 1919 Act, Exhibit A, was declared unconstitutional by the Supreme Court of the United States in the case of *Lemke, Attorney General, et al., vs. Farmers Grain Company,* 42 Supreme Court Reports, 209, the Supreme Court holding that certain provisions of

the Act, and particularly the so-called margin clause therein contained (Sub-division i, of Section 2, and Section 23, Exhibit A), constituted a direct burden on interstate commerce, and an attempt to regulate the same, and that such provisions were so interwoven in the Act that it was held the whole Act was invalid.

Following such decision, there being no session of the Legislature until January, 1923, a law was initiated, as provided by law, and was adopted by the voters at the general election in the fall of 1922, the vote upon the same being approximately three to one in favor of such law, this initiated measure known as "The North Dakota Grain Grading Act," being and is the law which is here questioned in connection with this appeal. A copy of this law is appended to this brief, marked Exhibit B, for the convenience of the Court.

II.

The plaintiffs in this bill of complaint attack the constitutionality of the North Dakota Grain Grading Law (Exhibit B), and further allege it is in conflict with the United States Grain Standards Act. A temporary restraining order was issued on December 6, 1922, and, in connection therewith, an order to show cause issued why an interlocutory injunction should not be granted restraining the enforcement of the State law pending a trial of the above entitled action on the merits. The interlocutory injunction was asked for upon the allegations of the bill alone, togeth-

er with the motion shown in the record in connection therewith. The defendants filed an answer to the order to show cause, which answer is found in the record. The hearing was had on January 5, 1923, before the Hon. W. S. Kenyon, Circuit Judge, and Hon. J. W. Woodrough, and Hon. J. D. Elliott, District Judges. At the conclusion of such hearing the Court specifically refused to make any finding in connection with the constitutionality of the law in question, and stated that in view of the fact that the Supreme Court had construed the former law, that the interlocutory order would issue solely to enable the Supreme Court to pass upon the validity of the North Dakota law in the first instance, and the Court thereupon made the order granting the interlocutory injunction found in the record, said order being entered on January 5, 1923.

On March 1 an appeal from such order to the Supreme Court of the United States was duly allowed, and the question is now before the Supreme Court upon the appeal of the defendants from the order allowing the interlocutory injunction.

As appears from the record it has been agreed between the attorneys for the parties hereto that the answer to the order to show cause, shall also stand as the answer of the defendants to the allegations of plaintiff's bill on the merits (See Reply filed).

Thereafter and about January 18, 1923, the plaintiff saw fit to file an alleged reply, which reply was expressly filed to the answer of the defendants *on the merits*, and such reply having been

served and filed several weeks *after* the issuance of the interlocutory order of January 5, herein appealed from, such reply has no proper place in the record on this appeal, but was included in the record by the clerk solely by reason of the insistence of the plaintiff's attorneys in their præcipe.

The questions then involved on this appeal are,

1. Is the North Dakota Act (Exhibit B), unconstitutional as a burden upon, or interference with, interstate commerce.

2. Is the North Dakota law invalid by reason of any conflict with the United States Grain Standards Act.

III.

Existence of Evils Should Be Presumed By the Court.

The Legislature having several times passed grain grading acts to remedy alleged abuses in connection with the marketing of grain, and the people of the State having duly passed an initiated measure at the last election, having the same general purpose, we do not understand that the fact of the existence of the evils found by the Legislature and the people to be in existence, can properly be questioned by the plaintiffs on this hearing. The existence of such abuses and evils, therefore, should be presumed.

McLean v. Arkansas, 211 U. S., 539.

Tanner v. Little, 240 U. S. 369.

It is disclosed that several times in the past the Legislature of North Dakota has passed acts for the purpose of abating alleged evils and abuses in connection with the marketing of grain. These acts culminated in the 1919 Act which was thereafter declared unconstitutional by the Supreme Court of the United States in the case of *Embden Co. v. Lemke*. Thereafter and at the general election in 1922, under the initiation laws in force in this State, the people by a vote of three to one passed the present measure. This measure is now attacked by the plaintiffs upon all the grounds and for all the reasons urged against the 1919 Act.

IV.

The Supreme Court having held the 1919 Grain Grading Act (Exhibit A), unconstitutional, it is, of course, natural that the plaintiffs herein should seek to characterize and denominate the present Act (Exhibit B), as of the same kind, nature and legal effect as the former act, in order that the inclination of the court might be at once directed toward a disapproval of the present law. We must respectfully urge the court not to be misled by such patent attempts on the part of the respondents on this appeal, because it is our contention here that there are vital distinctions between the 1919 Act, previously held to be unconstitutional, and the present Act.

The 1919 Act was a comprehensive act enacted in the then supposed full scope of the State's authority to control the purchase and sale, grading

and inspection of grain within the State of North Dakota. An examination of the provisions of that Act will fully disclose its general *inclusive, comprehensive* character. It has no reference to the Federal Act, and was in nowise dependent upon such Act.

The present Act we regard as vitally different. Guided by the decision of the Supreme Court in the *Lemké case,* above noted, the present Act has plainly been drawn with reference to the United States Grain Standards Act, and is, in its last analysis, simply an attempt on the part of the State, through inspection regulations, under the police power of the State, to assist in the full carrying out and performance of the aims and purposes of the Federal Act, in a field not entered by the Federal Act. The correctness of this position on our part is, we believe, established by an examination of the Federal Act, and the State Act.

V.

Former Act Was Exclusive of Federal Act, Present Act Is Wholly Co-operative. With the Federal Act.

Under the purview of the Federal Act, the Secretary of Agriculture has fixed grades and standards and conditions of quality for certain grains. It is the intention of said Act that all grain included within interstate commerce should be graded and inspected in accordance with the *grades* fixed by the Secretary of Agriculture under that

Act. *This is the single great purpose of the Federal Act.*

Under the 1919 Act, no attention was paid to the Federal Act, and the State claimed the right, as a part of the power of the State, to fix grades and standards and conditions of quality, and enforce the same regardless of the Federal Act.

Following the decision of the Supreme Court in the *Lemke case,* the attitude of the State, as indicated in the law now under discussion, is vitally different.

We have seen that the purpose of the Federal Act is to secure the uniform use of certain grades and standards, as fixed by the Secretary of Agriculture, and it is our contention here that the present Act is a State inspection measure, solely calculated to assist, supplement and carry out to the fullest extent thru the police power of the State, the aims and purposes of the Federal Act, for the protection and welfare of the citizens of the State, *in a field not covered by the Federal Act.*

This attitude on the part of the State is plainly approved by the language of the Federal Act in its many references to *state grading systems,* and in the provision which permits all state inspectors appointed under state inspection systems to become, *by virtue of that fact,* inspectors under the Federal Act, and in the interpretation given the Federal Act by the Secretary of Agriculture in enforcing it.

VI.

Basic Feature of State Act Is Requirement of License to Grade Grain.

An examination of the State Act discloses two major provisions:

1. A Federal or State license is required in order to entitle a person to *grade* grain.

2. When Federal grades have been established by the Secretary of Agriculture, no one shall buy grain *by grade*, unless that grain shall have *first* been graded by an inspector, licensed under *either* the State of Federal Act.

It is plain that the first of the foregoing propositions is the vital proposition, because if the person desiring to *buy* grain, be licensed to *grade* grain, no difficulty can be experienced in complying with the second provision, to-wit, that grain not officially graded, cannot be purchased by *grade*.

The vital question, therefore, in the consideration of this feature of the State Act, is whether the State is, in view of the intent and scope of the State Act, authorized to require a license either issued under State authority or under the authority of the United States, before a person is permited to engage in the *business of grading grain*.

Difference Between the 1919 Act and the Present Law.

The 1919 Act was most vitally different from

the present Act in that the 1919 Act required such license in order to either *buy* or *grade grain*, whereas the present Act simply requires a license to be authorized to *grade* grain.

Under the former State Act, a *State* license was absolutely required. Under the present Act either a State of Federal license authorizes a person to grade grain.

Under the old Act, grain buyers were made deputy state inspectors, while under the new Act they are simply required to hold a license.

Under the old Act the State made its own grades in its own right, while under the new Act the Federal grades are made obligatory.

Under the old Act, the rules and regulations made by the state inspector were wholly in control. Under the new Act, in effect, any rules and regulations made under the State Act are subordinate to rules and regulations made by the Secretary of Agriculture.

Under the old Act, a license fee was required, while under the new Act, a license is issued without charge.

Under the old Act, authority was given to the inspector to fix the margin of profit, and this clause was the most vital clause in the old Act, *and was the clause upon which the Supreme Court based the greatest part of its opposition to the State law.* Under the new law no authority is given to fix a margin, or to punish for an unreasonable margin, the power of the state supervisor being simply to investigate on that subject in order that information as to the margin may be forth-

coming for the information of all persons interested.

The result of these differences, all of which are vital in their character, is to change the State Act from a comprehensive act intending to control, in the right of the State, the entire business of the marketing of grain, to an act having as its greatest purpose the protection of the producers of grain through the *effective* installment of the grades and conditions of quality established by the Federal Act.

VII.

Vital Importance of Act of Grading Grain.

In view of the importance of the grain business and the vital dependence thereon by the entire State, and in view of the further fact that the returns to the great majority of residents of North Dakota is specifically fixed by the *price* obtained for their grain, and that the price for the grain is necessarily almost wholly determined from the grade given such grain, the vital importance of the *grading* of the grain becomes at once manifest.

The question for consideration is, therefore, whether the requirement of a license from the Federal Government or the State, in order to carry on this vitally important business—grain grading—is, in view of the vital nature of such Act as affecting the welfare of the State, beyond the power of the State.

VIII.

It has long been held that the grain business is peculiarly affected with a public interest.

Munn v. People, 94 U. S., 135.
Budd v. People, 143 U. S., 517.
Brass v. People, 153 U. S., 391.
Cargill v. Minnesota, 180 U. S., 452.
House v. Mayes, 21 U. S., 207.
Merchants Exchange v. Mo., 248 U. S., 363.

The result of these decisions is that the existence of the public interest referred to permits the regulation of such business by the State under the police power.

It has been definitely held by the Supreme Court that the State may require a license before permitting a person to engage in the grain business, regardless of whether the grain business conducted by the particular person be intra or interstate.

Cargill v. Minnesota, 180 U. S., 452.

This case is interesting on this point. The terms of the Minnesota Act discussed in the *Cargill case* were broader and more exclusive than the provisions of the State Act here discussed. In the *Cargill case* the State Act made it "unlawful to receive, *ship,* store or *handle* grain without a license," and empowered the State Commission to make all necessary rules and regulations controlling the receipt, storage, handling and *shipment* of grain, and that such rules and regulations should have the *force of law.* The various other provisions of the State Act, (which is appended to the

Court's opinion), show the extremely comprehensive nature of the Minnnesota Act. The undisputed evidence in the case disclosed that "*all* grain of every kind and description received into, or deposited or handled in, *or shipped from the warehouse,* was purchased by it for the express purpose of acquiring, shipping and transporting it as its property solely, *to its terminal elevators in Wisconsin and Illinois,* and other points east," and had been so handled. The proof further showed that no grain whatever had been received by the Cargill Company, *which had not been thereafter duly shipped out of the state.* It was contended that the State Act interfered with interstate commerce by requiring a license from the defendant in order to *handle* and *ship* grain under the terms of the State Act. The Court denied this contention and pointed out that the issuance of the license simply had reference to the business of the defendant at its elevator and warehouse, and that to require a license under such circumstances and under the provisions of the State Act, put no obstacle in the way of the defendant either with respect to the purchase of grain or its shipment out of the State.

It seems to us that if the provisions of the Minnesota Statute making it unlawful to receive, *ship,* store or *handle* any grain, without a license, and making the rules and regulations under which the license was to be used have the force of *law,* where *all* the grain handled was for interstate shipment, did not place an obstacle in the way of the *purchase* or *shipment* of grain by the Cargill Com-

pany, that it cannot possibly be concluded here that the simple requirement of a license in order to *grade* grain, puts any obstacle in the way of either the purchase or shipment of grain on the part of the plaintiffs here, where *all* of the grain is concededly not shipped out of the State. We think, as was said in the *Cargill case,* that "in no real or substantial sense is interstate commerce obstructed by the requirement of a license."

Nor does the fact that in the North Dakota law, provision is made for the establishment of rules and regulations by the state supervisor, impose any *unlawful* rules or regulations upon the plaintiffs. As was pointed out in the *Cargill case,* "the acceptance of a license in whatever form, will not impose upon the licensee an obligation to respect or comply with any provision of the statute, or with any regulations prescribed by the State Commission, that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the State, and the *valid* rules and regulations prescribed by the Commission."

Ordinarily the requirement of a license in connection with the passage and enforcement of inspection laws by the State, for the protection of the welfare of its citizens, is not regarded as a real or substantial burden upon interstate commerce, even if such inspection laws apply to articles in *interstate commerce.*

Hall v. Geiger, Jones Co., 242 U. S., 539, p. 558.

Hendrick v. Maryland, 235 U. S., 610, p. 622.
Asbell v. Kansas, 209 U. S., 251, and cases cited.

Complaint is made by the plaintiffs that the effect of the license is to place a burden on the purchase of grain freely by the plaintiffs in interstate commerce. It has long been held that in the exercise of its police power, a state has the right to pass laws in the nature of inspection measures, requiring such inspection *as a condition to the article inspected being handled or dealt in in the state.*

Sligh v. Kirkwood, 237 U. S., 52 (involving a state law forbidding the sale of unripe fruit).

Pure Oil Co. v. Minnesota, 248 U. S., 158, (requiring the inspection of oil shipped into the state before sale).

Standarn Oil Co. v. Graves, 249 U. S., 394, (enforcing a state inspection measure as against oils still in interstate commerce).

Turner v. Maryland, 107 U. S., 109, (upholding a state law requiring the inspection of tobacco before shipment or sale).

Pittsburgh v. State, 156 U. S., 590, (sustaining a state law requiring the inspection of coke before permitting the same to be sold).

Savage v. Jones, 225 U. S., 501, (permitting the inspection by the state of foods shipped into the state in interstate commerce).

The power of the state to pass inspection measures under its police power which operates upon persons and things admittedly included within the

scope of interstate commerce, is aptly illustrated by the series of cases decided by the Supreme Court, with reference to state laws forbidding the introduction of diseased livestock within the boundaries of the state, and which are held to only have an incidental and indirect effect upon commerce.

Reid v. People, 187 U. S., 137.

Asbell v. Kansas, 209 U. S., 251.

These cases are also aptly illustrative of the rule that Federal legislation on subjects included within interstate commerce, will not be held exclusive unless plainly so by the terms of the Federal act, and the right of the state to pass police measures for the protection of its citizens, is upheld in connection with matters wherein the Federal legislation is not exclusive.

The case of *Asbell v. Kansas*, cited above, also points out clearly that any supposed conflict between the State and Federal laws, is obviated by provisions in the state law accepting the exercise of the authority granted under the Federal laws,—a situation which applies most aptly in the consideration of the provisions of the State law here involved, wherein such law accepts all licenses, rules and regulations, as well as rules and conditions of quality promulgated by the Secretary of Agriculture under the Federal law.

The rules referred to and laid down in the foregoing cases just cited are all quoted with approval by the Supreme Court in its opinion in the ruling case of *Savage v. Jones*, heretofore cited.

It is not apparent wherein the present State Act differs in principle from the foregoing decisions.

If the grain in question is in interstate commerce, the State law simply acts as an inspection measure supervising the grading and inspection of such grain in connection with the marketing of the same. The requirement of a license to grade grain, and the subordinate requirement that grain cannot be purchased by grade unless duly inspected, imposes no more burden upon interstate commerce, and the right of the plaintiffs to freely deal therein, than was the case under any of the decisions above quoted, and the protection thereby afforded the people of the State is greater and more necessary than was the case in any of the cases cited.

IX.

The power of the State to require such a license may be considered under two aspects:

1. In the absence of Federal legislation on the same subject.

2. In view of Federal legislation on the same general subject.

In discussing the right of the State to pass laws in connection with the protection of its citizens, with reference to fields of operation in which Congress has not yet seen fit to act, it has long been held that state regulations calculated, in the opinion of the legislature or the people, to remedy evils and abuses supposedly existing, are valid and will be enforced.

Plumley v. Massachusetts, 155 U. S., 461.

Minnesota Rate Cases, 230 U. S., 352.
Sligh v. Kirkwood, 237 U. S., 52, p. 58.

These decisions make it clear that the State has power to pass the Act in question here, in the *absence* of congressional action covering the *whole subject* of the grain business.

IT IS CONTENDED, THEREFORE, BY THE *PLAINTIFFS*, THAT THROUGH THE PASSAGE OF THE UNITED STATES GRAIN STANDARDS ACT, THE WHOLE SCOPE OF THE GRAIN BUSINESS HAS BEEN CLAIMED BY CONGRESS, AND, THEREFORE, THAT THE STATE IS DEPRIVED OF ITS ENTIRE RIGHT TO ACT IN THE PREMISES.

In considering the right of the State to pass regulatory inspection measures, and require licenses, where there is Federal legislation on the subject, the Supreme Court has pointed out that 't the Federal Act is not, by its terms and *necessary construction*, exclusive, and does not occupy the *entire* field, that the State has a right to pass regulatory measures to protect its citizens, in connection with the propositions and fields not covered by the State Act.

Savage v. Jones, 235 U. S., 501, and cases cited therein.
Corn Products v. Eddy, 249 U. S., 427.

It remains, therefore, to be seen whether the United States Act is exclusive and covers the entire field.

X.

Is the Federal Act Exclusive?

Under the language of the Federal Act the continued existence of state grading systems is presupposed, and the state inspectors are *ipso facto* made Federal inspectors. This is pertinently shown by the situation at Minneapolis. The Federal inspectors at Minneapolis are such inspectors solely by virtue of an appointment as inspectors under the *Minnesota Law*. These so-called "Federal Inspectors" receive no pay from the Federal Government, but are paid either by the State or out of the fees charged for inspections. The actual administrations, therefore, of the Federal Act in the *only field in which it operates at all*, is almost wholly based upon the existence of *state authority* in connection with the original appointment of the persons already inspectors under state authority, who act as Federal inspectors.

In the regulations and regulatory announcements issued by the Secretary of Agriculture from time to time under the administration of the Federal Act, two things are made perfectly clear. First, that the Federal Act does not occupy the entire field; and, second, that the unoccupied field is admittedly left for the control of the State and local authorities.

For instance, in the announcement of the Secretary of Agriculture, No. 36, under date of June 26, 1918, the following language is used:

> "Inspections for the purpose of the Act are performed by grain inspectors licensed by the

secretary of agriculture. These inspectors are not employed by the Federal Government. They work either independently, or are employed by the various grain exchanges or state inspection department, and are not paid by the Federal Government. * * * Farmers shipping grain in carloads directly to terminal markets, receive the benefit of the grade assigned by licensed inspectors, while the farmers selling wheat to the local elevators do not, as a rule, have this advantage, and must accept grades assigned by the buyer or elevator man." (See Exhibit A, Record).

Again, under announcement No. 48, issued May 8, 1919, the following language is used:

"Wheat grading at Minneapolis and Duluth. When the farmer hauls his wheat to the station and sells it to the local elevator, a grade is placed upon it by the elevator manager, and not by a licensed inspector, because few inspectors are located at country points. This is true under the state grading systems, as well as under the Federal grades. * * * The department cannot, however, control the country buyers or elevator man, or the miller who buys grain on the spot. Such transactions are in intrastate and not interstate commerce. While the buyer may be using Federal grades, his grading is not under the jurisdiction of the department. If he does not assign the grades honestly, fairly and accurately, *the state officials only can reach him*" (See Exhibit B, Record).

Again, in announcement No. 54, under date of June 26, 1919:

"When the farmer hauls his wheat to a station in his own state, and sells it to the local elevator, although it is bought and paid for by grade, he is making a transaction which does not require an interstate shipment. The grade in these cases is usually placed upon

the wheat by the elevator manager. It is not then graded by a licensed inspector because the inspectors are seldom located at country points. This feature is unfortunate, but the volume of inspection work in any one country shipping point is hardly ever large enough, or continues over a sufficiently long period of time, to warrant inspectors in taking up work at such points. Therefore, the correct grading of wheat at country points is usually a matter between the farmer and the local buyer, *and is one with which the local authorities, and not the Department of Agriculture, can deal*" (See Exhibit C, Record).

Following the interpretation thus placed upon the Act by the Secretary of Agriculture and his assistants, the Supreme Court in the case of *Merchants Exchange v. Missouri*, 248 U. S., 365, specifically found that the United States Grain Standards Act was not intended to supersede state laws, but was intended to co-operate with state officials charged with the enforcement of such state laws.

We therefore suggest that, the Federal Act being plainly not exclusive, the State has full authority to pass regulatory measures in the nature of inspection regulations, for the purpose of protecting what it believes to be the general welfare of its people, with reference to matters and fields *not* covered by the Federal Act.

XI.

Matters in Which Federal Act Is Not Exclusive.

It will be at once seen that the Federal Act only operates at the great grain terminals. (See regulations above quoted). No attempt is made under the Federal Law to control the situation at the local elevator, or to put in force rules and regulations to be effective at such point.

It is plain that there are two great fields in connection with the marketing of grain, and two classes of people affected, each within its respective field.

The first great field is the local market, usually at the local elevator. This field alone concerns the actual grain growers, and at such point, in the majority of cases, all title and interest of the grain producer passes from such producer to the person or elevator company buying the grain. Once this purchase has ben completed, the interest of the producer is legally at an end. That field is completed.

The other great field is the handling of the grain at the great terminals such as St. Paul, Minneapolis and Duluth. When the grain reaches these terminals, it is, in the majority of cases, the property of the elevator company or its consignees. The producer no longer has any legal interest in it. The control of the marketing at such terminal points is simply for the protection of the elevator companies shipping it, and the consignees

receiving it, as well as ultimate consignees. This is the second and remaining great field.

The Federal Act operates only in the latter of these two fields. The first great field, which is the field which concerns alone the people of North Dakota, is plainly not within the operative purview of the Federal Act, because no attempt is made to provide for inspection at the local marketing point.

As we have seen under the language of the Federal Act, and under its interpretation by the Secretary of Agriculture and his assistants, the control of the first great field is left in the hands of state authorities. If the producer is to receive any proteciton in the first great field, it must come from *state* or *local* authority. It cannot come from *Federal* authority, because the Federal authority does not assume to enter that field.

XII.

State Requirement of Licenses to Grade Grain Operative Only Where Federal Act Is Not Exclusive.

The requirement of a license to grade grain as provided in the State Act, has reference solely to the first field above mentioned, to-wit, the local field. The requirement of this license is necessary in order that the State, as well as the Federal Government, in guarding the welfare of its citizens, may know *who* is purporting to carry on the business of *grading grain*.

As we have suggested above, the State Act is plainly based upon the Federal Act, and for the purpose of seeing that similar protection to the people of the State is given full force and effect in the first great field, in which the Federal authorities do not operate.

The State Act, therefore, requires a license issued by either the State or Federal Government in order to *grade* grain, in order that the State and Federal Government may have a means of knowing *who* is engaged in the business of grading grain, and in order that the existing evils and abuses at the local market, may be minimized by the actual securing of proper authorized *grades*, as fixed by Federal authority.

It is admitted in plaintiffs' bill upon which the interlocutory injunction is asked, that if the State Act is restrained, there will be *no* supervision or inspection of grading in North Dakota (Par. 12, Bill).

This means that the first great field will, if plaintiffs prevail, be entirely free from any supervision or enforcement looking toward the *actual giving* of Federal grades to the farmer.

Plaintiff's bill admits that in such event the grades given at the local elevator in the local field will be *different* in all probability from the grades fixed by the Federal inspectors at the terminals (Par. 15, Bill).

Considered as such an inspection measure in a field not covered by the Federal Act, in connection with particulars not included within such Federal Act, we think that the right of the State

to pass such reasonable inspection measures is clearly within the power held to be in the states under the decisions of the Supreme Court.

Savage v. Jones, supra.

Corn Products v. Eddy, supra.

It must at all times be kept in mind by the court that under the State law here involved *all* grains may be bought and sold freely, *without license or other supervision,* if they are bought by *type, kind* or *sample.* It is only when the purchaser seeks to buy grain under a *grade designation,* previously fixed by the Secretary of Agriculture, under the Federal Act, that the state law says that such grain must be first officially graded; and in order to make it reasonably certain that it shall be properly graded by someone *competent to grade,* provision is made for the supervision of such persons through the issuance of a *license,* authorizing only *competent* persons to grade grain.

It seems to us that the only possible effect of such provision is to effectuate, or put in actual operative force, the Federal grades; and since the license affords the State and its citizens information as to *who* is *grading* grain, and also enables the *qualifications* of such persons to be inquired into, the net result of such State Act is to more completely effectuate the carrying out of the benefits of the Federal Act, thereby insuring the actual use of the Federal Grades at the local market point —the point most vital to the grain producer,—a situation plainly recognized as not being covered by the Federal Act at present.

XIII.

As to License Required From Elevator Companies.

With reference to the right of the State to require a license for persons engaged in the grain business, it seems clear to us that this right has long been granted to states under the decisions of the Supreme Court in the Elevator and Warehouse cases.

Munn v. People, and other cases cited above.

As was held in the *Cargill case*, a license may be required to engage in the grain business, regardless of its *intra* or *interstate* character, and, therefore, presumably, a proper fee be charged for such a license.

Cargill v. Minnesota, 180 U. S., 452.

It is contended by the plaintiff that the fee for an elevator license required by the State Act is excessive. It may be conceded that the State could not exact an excessive fee.

Pure Oil Co. v. Minnesota, 248 U. S., 162.

Standard Oil Co. v. Graves, 249 U. S., 394.

At the same time we are clear that the license fee fixed by the State Act is not excessive. The usual elevator capacity throughout the State would be in the neighborhood of 25,000 bushels. This would require an elevator license fee of not to exceed $25.00. The fee itself is, under the terms of the Act, elastic, and the amount of one dollar for each thousand bushel capacity is the *maxi-*

mum, and it would undoubtedly be presumed that the *actual* expense and disbursement found necessary in connection with the carrying out of the provisions of the State Act would have a properly consequential effect upon the fixing of the required fee at its *maximum,* or correspondingly less.

The license fee fixed by the State Act is presumably reasonable.

Pure Oil Co. v. Minnesota, supra.

XIV.

Provision for Elevator Bonds.

The provision of the State Act requiring a bond sufficient to protect grain producers when dealing with an elevator company which does not pay cash for grain purchased, we regard as being an exceedingly valuable provision. As appears in the answer to the order to show cause, many elevator companies are obligated for grain purchased, many times more than the amount of the present bond, and it is seriously believed that many of such companies are without sufficient financial responsibility to make good in the future. It is shown that during the year 1921, many losses were sustained by grain producers in the State by reason of the inability of elevator companies to pay their obligations in full. We can see no possible way in which the requirement of the State Act in this particular can be held to be violative of any right of the plaintiffs, and no

more necessary protection to the grain producers of the State, can possibly be imagined.

Another valuable provision of the present law is Section 9 of the law (Exhibit B), providing for the furnishing of a bond by persons buying or shipping grain on credit.

A large class of persons and corporations engaged in the handling and shipping of grain, do business on credit. Naturally the grain is at once removed from the state, and at an early date disposed of at the terminals. In many cases such persons have no property or investment within the state, and in many cases where such investment and property exists, the same is heavily encumbered, and the average grain producer has no proper time, occasion or opportunity of investigating the financial responsibility of such persons and corporations. The result is that at different times in the past, *payment* for grain, previously sold on credit, *could not be had*, and the producers lost a large part, if not all, of their crop by reason thereof. Accordingly, to meet this condition, the law requires all persons, whether individuals or corporations, buying or shipping grain on credit, for profit, to file a bond with the supervisor, sufficient in amount to protect persons who have sold grain to such persons or corporations, on credit. The provisions of the act apply to all persons or corporations within the class, whether resident or non-resident. The answer to the order to show cause discloses that many losses were suffered during 1921 by reason of the inability of elevator companies and buyers to pay their obligations in full.

So exceedingly vital and valuable was this provision in the present law deemed by all persons concerned, that the court which granted the interlocutory injunction appealed from, *excepted from the terms of that order the provisions of Section 9, and, in effect, authorized and permitted the supervisor under the Act to enforce that provision, it being fully apparent to the court that such protection was vitally necessary to prevent great damage and loss in the future to grain producers.*

XV.

Dockage Clause.

An additional feature of the State Law requires consideration. The State Law requires the elevator company to either *pay* the farmer for valuable dockage taken, or to *return* such dockage to the farmer. Of course, an intelligent administration of the law would not require, in connection with the *return* of dockage to the farmer, the specific, identical dockage. An equivalent amount of similar dockage would undoubtedly be a compliance with the State law, and would in all cases result —and does so result—from a practical working out of the law. There is, therefore, no reason for the extended complaint made by the plaintiffs in their bill that the state law would require the installation of expensive cleaning machinery, etc. However, even in that event, the plaintiffs should be required to have proper machinery for

the proper conduct of their business. *Cleaning machinery* may be fully as essential as proper scales. They should not be permitted to take the farmer's dockage without compensation, simply because of a claim that they have not the *proper* cleaning machinery available. This is particularly true, since, if they cannot *return* the dockage, all they have to do is to *pay* the farmer the market price for it, that is—the price which the elevator people themselves will receive for this dock age when it is finally sold by *them*, for *their own* benefit, less, of course, transportation expense, etc.

The situation here is an anomalous one. The plaintiffs contend in their bill (Paragraph 16, Bill), that the farmer is *now* compensated fully for valuable dockage in connection with the purchase of the grain, through the claimed higher price allowed for grain containing valuable dockage. If this is *true*, plaintiffs cannot possibly be damaged by the provision in the State Law, because they would be required to do no more than they already *claim* to be doing.

We believe, however, that the real fact is entirely different. The answer here shows that during the time that the former State Law was in operation, the actual reports (and the reports were not complete), which came to the State Grading Authorities, *showed dockage paid for which ran as high as* $18,000 *from a single elevator.*

It is our belief, and, we think, the belief of the grain producers of North Dakota generally, and certainly that of the people of the state in passing

this law, that practically all of this valuable dockage has in the past (except when the former State Law was in force), been "appropriated" by the elevator companies without any compensation or payment whatsoever, and that if the present state law in that respect is destroyed, such appropriation of dockage will inevitably continue, and that such hope on the part of these plaintiffs is the *main reason* for complaint against the State Law.

We do not think that this dockage provision raises any conflict with the Federal Act. The Federal Act defines dockage, but contains no provisions with reference to a return or payment for the same. The Federal Act, therefore, was not intended to be exclusive of that subject, and under the rule laid down in *Savage v. Jones, supra*, state regulation in that regard should be upheld. It seems to us the situation is not essentially different from that disclosed in the case of *House v. Mayes*, 218 U. S. 207.

XVI.

Complaint is also made that the State Law conflicts with the United States Grain Standards Act in the following particulars:

Section 4 of the Grain Standards Act makes it *unlawful to* ship or deliver for shipment in interstate commerce, grain not inspected by a *Federal* Inspector. A second proviso of this Act provides that grain may be shipped in interstate commerce without inspection at the point of shipment by an inspector *licensed under the Act*, to or through

any place at which an inspector under the Act is located, subject to be inspected by a licensed inspector at the place to which shipped, or at some convenient point through which shipped, for inspection. It is understood by this proviso that a shipment of grain in interstate commerce would be authorized from a point in North Dakota where there was no licensed inspector under the Federal Act, to Minneapolis or Duluth, in Minnesota, to be there inspected by a Federal inspector. It is claimed that the requirement of the North Dakota law that grain cannot be purchased by grade unless it has been inspected, conflicts with this proviso of the Federal Act.

Keeping in mind the rule laid down in *Savage v. Jones,* that a construction should be adopted, if possible, which would obviate any conflict between State and Federal legislation, it seems clear to us that the provision of the Federal Act is not intended to prevent an inspection *by the State,* at the point of shipment. Let us point out that the provisions of the Federal Act refer only to the presence or absence of an inspection *by a Federal inspector.* It simply provides that inspection by a Federal inspector shall not be *necessary* in order to permit the shipment of grain. It does not even pretend to state or infer that inspection by *any person* other than a *Federal* inspector, is prohibited. If the language of the proviso is confined to its actual meaning, to-wit, inspection by a *Federal* inspector, no possible conflict can be caused between such provision and the provision of the State Law which requires an inspection of grain by

either a State or *Federal* inspector before purchase.

Particular complaint is made by the plaintiffs because of a claimed conflict between the Federal Act and the State Act because of the provision in the Federal Act that inspectors must be wholly disinterested, while under the State Act the persons grading grain are in the employ of elevator companies.

In view of the fact that the grading at the point where the State Act is operative, is done by the elevator companies themselves, *through their own employes*, we feel that the court ought to assume that such inspection and grading by "interested persons" would not, in any case, be unfavorable or antagonistic to the rights of the *plaintiffs*, the employers.

Furthermore, it is the purpose of the Federal Act to require the use of the Federal Grades in interstate commerce. It has been held that the transaction at the local elevator is an interstate transaction. It must be conceded that the Federal Act does not operate at such local point, and that it is the idea of the Secretary of Agriculture and his assistants that all supervision at such local point must be left to the state authorities. We cannot, therefore, see how there can be a conflict between the Federal Act and the State Act by reason of the supervision of grading and inspection made at the local point, simply because such actual grading is performed by an interested person, *i. e.*, an employe of the elevator company, who,

under the *present* law is not an inspector or official.

It must be borne in mind that under the *former* Act such employe was made a *deputy inspector,* while, under the *present* Act, he simply becomes a licensee empowered thereby to grade grain.

He already grades the grain; the State law simply adds the regulatory feature of a license.

Nor are we impressed with the claim that the result in *a dual* inspection. It is most strenuously asserted by the plaintiffs (though denied by defendants), that the grading of grain is a simple task, and the farmer is fully competent to see that the grading is correct without the need of any assistance from the State. If this is true, it ought to be very easy for the elevator *buyer* to grade the grain correctly. If the grain is thus graded correctly, the entire purpose of the State Act is carried out. If the grain is, therefore, graded correctly, (and it must be assumed by the plaintiffs that it will be), how will the plaintiffs suffer through the administration of the State Law by reason of a claimed dual inspection, over and above the difficulties under which the plaintiffs already claim to labor, to-wit, the present act of grading *performed by their own employe*, resulting in the claimed fact that the grades allowed them by the Federal Inspectors at the terminals may be different from the grades at which the grain is now purchased (Par. 15, Bill).

The same burden is borne by the plaintiffs whether the State Law is upheld or not, since plaintiffs must *grade,* in the first instance. The

only burden that can be placed upon the plaintiffs under the State Law is in event the plaintiffs wilfully fail to grade grain *honestly*, and certainly the complaint of a *"dual"* inspection should not be permitted to place the plaintiffs in a position where they may grade grain *dishonestly*, and escape all responsibility and liability therefor, and deprive the producers of the grain of any supervised inspection at all.

XVII.

In an endeavor to carry out their plan of making the present law (Exhibit B), susceptible to the same objections sustained by the Supreme Court to the former law (Exhibit A), it is asserted by the respondents here that the present law does and is intended to empower the supervisor mentioned in the Act with authority to fix margins of profit. This contention is based upon the language in Sections 4 and 17 of the present Act (Exhibit B).

The Court will note that Section 4 provides for the duties of the state supervisor, and states that—

> "* * * he shall in a general way investigate and supervise the marketing of the same with a view of preventing unjust discrimination, *unreasonable margins of profit*, confiscation of valuable dockage, fraud, and other unlawful practices."

In Section 17 it is provided that—

> "All of the duties and obligations which were formerly performed by the state inspector of grades, weights and measures, and all

of the obligations placed upon him by law, are hereby transferred and made part of the duties of the supervisor of grades, weights and measures."

It is contended from these two sections quoted, that the present law attempts to authorize and permit the supervisor to regulate and fix margins of profit.

We made no such contention in the answer to the order to show cause, and we specifically opposed such contention in the argument in the District Court, and upon this appeal we insist that no such power is contemplated or granted by the Act to the supervisor. Section 17, properly construed, has no reference whatever to the provisions of Section 4. Section 4, in its reference to margins, is simply of a general nature, so that the supervisor may acquaint himself with the margins which are being taken in connection with the marketing of grain, in order that the public, and other persons interested, may, if necessary, be advised as to the facts. No power is given to the supervisor to fix the margin, or to in any way punish anyone by reason of the amount or unreasonableness of such margin. A comparison of Section 4, of the present Law, with Sub-division i, of Section 2, and Section 23, all of the 1919 law (Exhibit B), will disclose how far-fetched the contention of the respondents that the purpose of the two acts is identical, really is.

Section 17 of the present Act, was intended to have reference to, and has reference to certain other powers conferred by other statutes which were

placed upon the shoulders of the former inspector of grades, weights and measures, notably laws with reference to testing scales, and the like. For instance: Chapter 241 of the Laws of 1919 is a general Act for the inspection of weights and measures, including scales, and other similar devices, and creating a penalty for false scales and measures, etc.

This act is wholly separate from, and is no part of the so-called 1919 Grain Grading Law, which was declared unconstitutional by the Supreme Court in the *Lemke case*. The duties required under Chapter 241 are, by the terms of the Act, placed upon the person who *was* state inspector of grades, weights and measures, such state inspector being appointed under the provisions of the 1919 Act, known as the 1919 Grain Grading Act. With the elimination of the state inspector, by reason of the invalidity of the 1919 Grain Grading Act, it left Chapter 241 up in the air, because the person directed to enforce the Act, to-wit, the inspector, had been eliminated by the failure of the law which *created the office of inspector*. The initiated law, therefore, for the purpose of providing for a person who should enforce Chapter 241, enacted Section 17 in the present Act, so that the supervisor under the present initiated act, would assume the duties which had previously been placed upon the inspector as detailed above. This was the sole and only purpose of Section 17, and we insist that such section should be wholly confined thereto.

Furthermore, the 1919 act purporting to give the

inspector the power to fix margins was declared unconstitutional by this court in the *Lemke case* above cited. From the date of that decision, therefore, such law had no legal existence or validity, and not the slightest attempt has been made to carry out or enforce any part of it contrary to either the letter or spirit of the decision of this court.

It is familiar law that statutes previously repealed or declared unconstitutional cannot be revivified or re-enacted *by reference*, and the provisions of Section 17, even if so intended, could not by any possibility actually clothes the supervisor with any of the powers granted under the 1919 Act (Exhibit A), which had been specifically declared void by this court.

In addition to the foregoing we are entirely willing, and ask the Court to so construe the provisions of the Act under consideration, as not to grant or permit to the supervisor the power to fix margins of profit, and that the court should, if it so desires, hold any such claimed power on the part of the supervisor under and by virtue of the terms of the present Act (Exhibit B), to be unconstitutional and void.

We make no contention that the supervisor has this power. We deny that the Act extends such power to him, and we assert that no such intention is properly deducible from the provisions of the Act. It is simply a straw man created by the imagination of counsel for the purpose of enveloping the present Act within the provisions of the decision of this Court in the *Lemke case* with ref-

erence to the margin clause actually contained in the 1919 Act.

XVIII.

There is, therefore, not only no attempt to ignore the supremacy of the United States Grain Standards Act, or to resist or embarrass the rules of law laid down by the Supreme Court in the decision in the *Lemke case,* but on the other hand a plain, bona fide attempt by the State of North Dakota to co-operate with the Federal Act and to yield to the points of invalidity established by the decision of the Supreme Court. The result is, in our humble opinion, a wholly distinct and different measure from the 1919 Act, upon a distinct and different legal basis, and requiring the application of rules of law different and distinct from those enforced by the court in the *Lemke case.* The State believes that the need for supervision of the act of grading at the local elevator point is vitally necessary to the welfare of its citizens. The field covered is not touched by the operation of the Federal Act, and the provisions of the State Act are plainly on their face intended to carry out the main object of the Federal Act in a field where the Federal Act does not operate.

XIX.

In our foregoing discussion we have pointed out, as we believe the fact to be, that the present State Act here in question, was passed as a regulatory

measure under the police power of the State, in connection with the supervision of the grading of grain in a field in which the Federal Act is not exclusive, and that within such field, even though such field be interstate, no real or substantial burden or interference is had with or upon interstate commerce.

Outside of this contention we believe it proper to suggest to the Court that under the provisions of the decision of this Court in the *Lemke case*, the provisions of the present law with respect to the supervision of grading of grain at local elevator points, are not within the field of interstate commerce, and take place and are in full effect in a field absolutely within the sole power and control of the state. We shall discuss this contention as briefly as possible.

XX.

In the opinion of the Supreme Court in the *Lemke case*, various provisions of the 1919 North Dakota law were considered by the Supreme Court. Among these provisions was the provision authorizing the inspector to fix margins of profit. This provision the Supreme Court held to be a direct regulation of interstate commerce, and, therefore, invalid. In addition thereto the Supreme Court held that the right of purchase was a part of the unit of commerce. The Court thereupon said, as we view the decision, that inasmuch as all of these different provisions were involved in one complete law, that it was impossible for the Court

to separate the invalid provisions from the valid provisions; therefore, that the presence of the provisions found invalid, would invalidate the entire law.

The Court in the *Lemke case* did not specifically or inferentially hold that the act of *grading* grain was apart of any unit of interstate commerce. The Court did not hold in that decision, as we read it, that any Act which *preceded the purchase* of the grain, formed any part of interstate commerce. Under the 1919 Act (Exhibit A), Section 14 prohibited any person from *buying* grain, unless licensed as a deputy inspector under the State Law.

By reason of these provisions, therefore, involved in one complete law, as the Court found, the entire law was declared invalid.

As we have pointed out to the Court heretofore, the vital provision of the present law is that grain must be *inspected* and *graded before sale,* by someone having a *license* to *grade.* Such person may be licensed to grade grain either by the Federal authorities or by the State authorities, but the grain must be graded by someone before it can be purchased *by grade. The section then provides that grain may be purchased by sample or type, without the necessity of any license whatever,* provided it is not purchased by *grade.* It is plain, therefore, that the vital point under the present act is the *grading* of the grain by a person licensed to grade grain. In other words, the grading of grain by a person who has convinced either the State or Federal authorities that he knows enough to grade

grain to be entitled to perform such a vitally important duty.

All that the farmer has is his crop. All the returns for his years' work and labor must come from the crop. The returns are directly based upon the grade placed upon his grain. It is impossible, therefore, to appreciate any act more directly affecting the prosperity and welfare of the people of the State than the grading of grain. Before a person is entitled to grade grain, therefore, he must convince the authorities, either State or Federal, as to his ability and experience, and is then granted a license without charge.

It is important then, we believe, for the Court to clearly understand that the act of grading, including all of the details in connection therewith, is always and essentially prior to the purchase of grain. The purchase may immediately follow the act of grading, or it may not. It is neither essential nor necessary that it should. The purchase of the grain is entirely distinct from the act of grading. Indeed, the act of grading may be entirely separate from the act of purchase, and the grain may be graded without any intention of sale at all, but simply for the purpose of storage, transfer, certificate, etc. In any case the act of grading necessarily antedates the purchase by the buyer and the sale by the purchaser. So that even if the Court adheres to the rule that the act of purchase is a part of the unit of interstate commerce, such decision by the Court has no effect and is not applicable to the question as to wheth-

er the act of grading grain is or is not included within the unit of interstate commerce.

That our contention in this respect is correct, is conclusively established, we think, when we consider the fact that a very large portion, if, indeed, not the larger portion of the grain delivered at the local elevator by the farmer, is not sold at all, in the first instance, but is delivered for storage purposes. Of course, in order to properly designate such grain delivered for storage only, it would be necessary to *grade* it first in order that the storage ticket should accurately define the grade of the grain so stored. So that we have in all of such instances specific illustrations of the undeniable fact that the act of *grading* is wholly separate and distinct from the act of *purchase*, and that the act of grading does not imply purchase as a necessary result, so that since the act of grading is a necessary act not based, as a matter of fact, upon the question of purchase, it should be considered as wholly distinct from the purchase, and, necessarily, as prior thereto, so that it should not be held to be any part of the union of interstate commerce, because the inception of such interstate commerce has not yet been had.

It has been long held by this Court that interstate commerce had its inception with the delivery of the commodity to a common carrier for shipment outside the state, and that the intention of parties to thereafter ship in interstate commerce did not envelope the commodity with the character of an interstate shipment prior to the delivery to such common carrier.

We have, therefore, the situation where grain raised in North Dakota, harvested and taken to the local elevator point, by the producer, and still the sole property of the producer, is required by the State, if it is to be sold by *grade,* or if it is to be stored, *without sale,* to be first graded by some one licensed and qualified to grade, by either the State or Federal authorities. Does not such a provision operate and have its full effect while the grain is still within the exclusive control and jurisdiction of the State authorities? Does not the State Act requiring the grading of grain before sale, if the subsequent sale is to be made by grade, where, indeed, the grain may be and largely is, stored without sale, apply only to property wholly intrastate, and entirely within its own jurisdiction? True, the wheat is harvested and taken to the local elevator to be subsequently stored or sold. The State Act simply says in effect, that before it can be sold or stored, by *grade,* it must be properly graded. The necessity for proper grading is, as we have shown, apparent at once, and the necessity is a vital one. Even after the grain is graded, the farmer, for any reason which may seem sufficient to him, could refuse to proceed further, store the grain, or sell and dispose of the grain, elsewhere, and thus prevent the buyer from buying the same. In short, we submit that the act of *grading* is wholly distinct from that of *purchase,* and is to be applied under the State Law prior to purchase, and at a time when the grain remains in the sole control of the State.

This contention, we respectfully submit, does no

violence, and is not in opposition to the decision of this Court in the *Lemke case,* the Court there having in mind a statute which forbade the *purchase* of grain by any person who did not hold a license as *deputy state inspector,* and a statute which further attempted to confer upon the inspector the power to regulate thereby indirectly fixing the price of grain and fix margins of profit.

We are pursuaded that this case is ruled by the decision of the Supreme Court in the case of *Heisler v. Thomas Colliery Co.,* 43 Sup. Ct. Rep., 83, decided Nov. 27, 1922, wherein the State of Pennsylvania sought to tax antharacite coal *when the coal is ready for shipment or market.* True, the *Heisler case* was a tax case, but the question which the Court seems to consider in that decision was whether anthracite coal, ready for shipment or market, but which had not actually been delivered to a common carrier for shipment, was or was not "governed exclusively by the domestic law," or whether it had "begun to be governed and protected by the national law of commercial regulation." In determining this point the Court disposed of the contention that the fact that "the products of a state have, or are destined to have, a market in other states." that therefore the same became subjects of interstate commerce, though they had not moved from the place of their production or preparation. The Court says:

> "If the possibility or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow

> that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries. It would nationalize and withdraw from state jurisdiction, and deliver to Federal commercial control, the fruits of California and the South, the wheat of the west and its meat, the cotton of the south, the shoes of Massachusetts, and the woollen industries of other states, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet on the hoof, wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for, and shortly to be exported to states other than those of their production."

Without wishing to burden the Court by further discussion on the point, if anthracite coal, ready for shipment or market, is within the *exclusive control* of the State, because the "final movement for transportation from the state" had not begun, does not the same situation apply to wheat also "ready for shipment or market," which has not yet been sold, which may never be sold, and which, before it can be sold or stored without sale by grade, must have such grade fixed by some properly competent person Is not the wheat, at this point, as well as the coal, still within the exclusive jurisdiction of the state, and even if the right of purchase be held to be a part of the unit of interstate commerce, does not the fact that the purchase must come (if it shall indeed come at all), subsequent to the grading of the wheat, if the wheat is purchased by grade, show that at the time the act of grading is to be performed, to-wit,

while the grain is still in the farmer's own wagon, his own property, and subject to such disposition, as he wishes to make of it, conclusively demonstrate that the act of grading takes place at a time prior to the inception of any part of the unit of interstate commerce? Otherwise, when does the interstate unit with respect to wheat begin? Does it begin when the farmer has threshed the wheat, or when he has loaded it into his wagon, or when he is on the way to the elevator with it? Does it begin when he comes in sight of the elevator, or when he submits it to the grader to be graded? Does it begin when he decides to store it, or not to store it. It has always seemed to us that the wheat does not lose its intrastate character until it has been delivered to the common carrier for shipment, either by the farmer, the elevator company, or the purchaser. Of course, it must be also observed by the Court that even though the grain is purchased by the elevator company, the option still remains with the elevator company whether they will hold it, sell it locally, ship it to other points in the state, or ship it outside of the state; and, as the Supreme Court said in the *Heisler case, supra,* the mere intention to thereafter ship in interstate commerce, even though embracing the entire production, has nothing to do with the inclusion of the commodity within the protection of interstate commerce.

XXI.

We submit that the decision in the *Lemke case* does not and is not intended to, hold that the act of *grading* is included within the unit of interstate commerce, and that the present State Act here complained of is pointed solely toward the *proper* performance of the act of *grading*, and that such act of *grading* takes place *before* the act of *purchase*, and while the grain is still in the exclusive control of the state, just the same as was the case with anthracite coal in the *Heisler case*.

Of course, it follows, if our contention is sound, that the present law would be upheld by this Court, because it would then be held to be operative within a field in which the state had exclusive authority, to-wit, prior to the commencement of interstate commerce.

XXII.

In conclusion, therefore, we respectfully contend:

1. That the North Dakota Grain Grading Act (Exhibit B), is a police measure, enacted by the State of North Dakota for the protection of the welfare, happiness and prosperity of its citizens, and that it places upon interstate commerce no real or substantial burden or interference.

2. That the State Act is intended to be cooperative with the Federal Grain Standards Act, by effectuating the establishment and promulgation of the United States Grain Standards Act grades and standards, at the local elevator point, an evil at present not covered by the administration of the Federal Act, but one which is left to the local or state authorities.

3. That, properly construed, the North Dakota Act does not conflict with the United States Grain Standards Act, but is harmonious thereto, and co-operative therewith.

4. That the provisions of the State Law requiring a license to grade grain, such license to be issued by either the Federal government or the State government, operates and takes effect while the said grain is wholly within the domain of State authority, and prior to the inception of the unit of interstate commerce in any particular.

The District Court in allowing the interlocutory injunction, specifically declined to pass upon or express any opinion as to the constitutionality or unconstitutionality of the present Act. The act of the District Court, therefore, in issuing the interlocutory order, creates no presumption against the validity of the law. The determination of the questions involved on appeal are essentially questions of law as based upon the construction of the provisions of the statute at issue. The submission, therefore, of such questions upon appeal from the interlocutory order is not only proper but advisable.

We therefore respectfully submit that the North Dakota Grain Grading Act should be declared valid and constitutional, and the order granting the interlocutory restraining order should be reversed and set aside.

Respectfully submitted,

GEO. F. SHAFER,
Attorney General,

SETH W. RICHARDSON,
Special Asst. Attorney General,
Attorneys for Defendant.

EXHIBIT "A".

"Sec. 1. The Governor of the State of North Dakota, on or before the 30th day of June, 1919, shall appoint for a term of four years a member of the faculty of the North Dakota Agricultural College (who shall be an expert in the grading and weighing of all kinds of grain, seeds and other agricultural products) to be the state inspector of grades, weights and measures, who shall receive, with the approval of the state board of regents, the sum of one thousand dollars per annum.

Sec. 2. The state inspector of grades, weights and measures shall have the power and is hereby directed:

(a) To appoint a chief deputy state inspector of grades, weights and measures; a chief elevator accountant; deputy insnector of grades, weights and measures; state deputy inspector of grades, weights and measures, and warehouse inspectors;

(b) To issue licenses to warehouses, buyers and solicitors of grain, seeds and other agricultural products;

(c) To establish uniform grades for grain, seeds or other agricultural products for the State of North Dakota with power to alter and modify such grades;

(d) To establish uniform grade certificates used in the marketing of grain, seeds, or other agricultural products;

(e) To hear and determine appeals from the decision of state deputy inspectors and from deputy inspectors and from deputy inspectors of grades, weights and measures;

(f) To conduct investigations into all matters directly or indirectly connected with or bearing upon the marketing, grading and weighing of all grain, seeds and other agricultural products with power to summon, subpoena and compel the attendance of witnesses, and the production of books and papers, and administer oaths whenever it may be necessary for more effective discharge of his duties, and shall have the power to punish for contempt.

(g) To employ such deputies, experts, accountants, clerks and all other employees necessary to carry out the provisions of this Act with power to fix and determine the compensation and bonds of all such deputies, experts, accountants, clerks and other employees;

(h) To inspect public warehouses and to establish, amend, and alter rules and regulations for handling, storing, weighing, grading and inspecting grain, seed and other agricultural products and for the management of public warehouses for the purpose of carrying out the provisions of this Act or any other law in this State in regard to the same, provided, that all such rules be published by the state inspector of grades, weights and measures in such manner as to give the greatest publicity thereof;

(i) To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills;

(j) To fix and determine all charges for grading, inspecting and weighing grain or other agricultural products;

(k) To make rules and regulations for the purpose of carrying out the provisions of this Act and to do any and all things necessary or expedient for said purpose.

Sec. 3. It shall be the duty of the inspector of grades, weights and measures to proceed at once to define and establish uniform grades and weights for grain, seeds, or other agricultural products, also for flour meal and products made therefrom, either singly or combined. In establishing such grades, dockage shall be considered as being of two classes, first, that having value, and second, that having no value, the former to be considered and paid for at its market value.

Sec. 4. The term 'deputy inspector of grades, weights and measures' within the meaning of this Act is defined as any firm, person, company, corporation or association that buys, weighs and grades grain, seeds or other agricultural products, and holds a license issued therefor by the State inspector of grades, weights and measures.

Sec. 5. The term 'state deputy inspector of grades, weights and measures' within the meaning of this Act is defined as one who is in the employment of the State of North Dakota and has received an appointment from the state inspector of grades, weights and measures.

Sec. 6. The term 'solicitor of grain, seed and other agricultural products' within the meaning of this Act, is defined as one who engages in the business of soliciting grain, seed and other agricultural products to be sold for the benefit of the consignee or otherwise disposed of for the benefit of himself, an agent, broker or factor.

Sec. 7. The term 'public warehouse', within the meaning of this Act is defined as all buildings. elevators, or warehouses, and all grist and flour mills doing a shipping business in this State, erected or operated or which may hereafter be erected or operated by any person, association, co-partnership, corporation or trust for the purpose of buying, selling, storing, shipping or handling grain for profit.

Sec. 8. The chief deputy inspector of grades, weights and measures and chief elevator accountant shall have power and authority under the direction of the state inspector of grades, weights and measures to carry out the provisions of this Act. They shall be stationed at the North Dakota Agricultural College.

Sec. 9. State deputy inspector of grade weights and measures may be stationed by the state inspector of grades, weights and measures at any town or place where grain, seeds or other agricultural products are bought, sold, marketed, stored or manufactured. They shall have power and authority under the direction of the state inspector of grades, weights and measures to inspect, weigh and grade grain, seeds or other agricultural products at such places.

Sec. 10. It shall be the duty of deputy inspectors of grades, weights and measures to weigh, inspect and grade all grain, seeds and other agricultural products that shall be offered for sale or shipment at their market place, according to the provisions of this Act and the rules and regulations established by the state inspector of grades,

weights and measures. They shall issue a certificate stating the kind of grain, seeds, or other agricultural products, giving the grade, test-weight per bushel and the reason for all grades below Number 1, and shall deliver to the owner or agent of such grain said certificate. It shall also be the duty of said deputy inspectors of grades, weights and measures, to accurately sample grain, seeds and other agricultural products in wagon loads, carloads or other containers, and forward samples thereof to the state inspector of grades, weights and measures when instructed to do so by the state inspector of grades, weights and measures.

Sec. 11. The state inspector of grades, weights and measures may issue a license to any person engaged in buying, weighing and inspecting or grading grain, seed or other agricultural products, or the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill, provided that such buyer or agent shall pass such examination as to his competency as may be prescribed by the state inspector of grades, weights and measures. The condition of such license shall require such deputy inspectors of grades, weights and measures to fix grades and dockage of grain and seeds inspected at their respective places of business and correctly weigh the products so inspected and graded according to the provisions of this Act and the rules and regulations made hereunder. The state inspector of grades, weights and measures may issue a license to any person engaged in soliciting or procuring consignments of grain,

seeds or other agricultural products, providing that such solicitor shall pass such examination as to his competency as may be prescribed by the state inspector of grades, weights and measures. The condition of such license shall require such solicitor to comply with the provisions of this Act and all rules and regulations established by the state inspector of grades, weights and measures. The state inspector of grades, weights and measures may suspend or revoke any license issued by him under this Act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has issued any false certificate of grading or has violated any provision of this Act or the rules and regulations made hereunder. All licenses issued under this section, unless revoked as herein provided, shall terminate on the 30th day of June each year. Licenses shall not be transferable without the consent of the state inspector of grades, weights and measures.

Sec. 12. The state inspector of grades, weights and measures shall collect a fee of $10.00 for each license issued under the provisions of Section Eleven of this Act.

Sec. 13. Each deputy inspector shall cause his license to be posted in a prominent and conspicuous place at his place of business and shall not be authorized to inspect, weigh or grade grain or seed in any other place except on the approval of the state inspector. Any solicitor for grain, seeds or other agricultural products shall produce his

license for examination when requested to do so by any interested person.

Sec. 14. It shall be unlawful for any person to buy or grade grain, seeds or other agricultural products who is not licensed as a deputy inspector of grades, weights and measures. It shall be unlawful for any person or persons, corporation or association operating a public warehouse to purchase, weigh, grade or inspect grain, seeds or other agricultural products, without first procuring a deputy inspector of grades, weights and measures' license, provided, however, that this section shall not prohibit state deputy inspectors from inspecting, weighing and grading grain, seeds, and other agricultural products under the direction and supervision of the state inspector of grades, weights and measures. Provided further that this section shall not prohibit producers from buying and selling grain, seed and other agricultural products to one another.

Sec. 15. Any person may without a license buy any grain, seeds or other agricultural products that have been graded, inspected and weighed by a deputy inspector of grades, weights and measures, or state deputy inspector of grades, weights and measures.

Sec. 16. The state inspector of grades, weights and measures may upon the cancellation or suspension of any license issued hereunder permit the business of any licensee to be completed and finally closed under the inspection and supervision of a state deputy inspector who shall be stationed at the place of business of such licensee. All the

expenses of such inspection and supervision shall be paid by such licensee.

Sec. 17. The state inspector of grades, weights and measures shall cause the grades established hereunder to be published in not more than five newspapers of general circulation in the State of North Dakota, two of which shall be devoted to the benefits of agriculture and three shall be papers of general circulation. Such notice shall specify the date when the grades so established shall become effective, which shall be not less than thirty days in advance of such date.

Sec. 18. The state inspector of grades, weights and measures may establish central markets for the display of samples of grain, seeds or other agricultural products and may install a deputy in charge of any such central market at cities, or towns without or within the State of North Dakota. Such markets shall be open to any and all persons desiring to buy or sell on said market and shall be operated and conducted under such rules and regulations as the state inspector of grades, weights and measures may establish therefor.

Sec. 19. The state inspector of grades, weights and measures shall receive, hear and determine all appeals from the decision of all state deputy inspectors and from all deputy inspectors. All such appeals shall be heard and determined by the state inspector of grades, weights and measures under such rules and regulations as he may establish therefor, and he shall consider the flour and bread producing qualities of such grain where such final decision is necessary. It shall be the duty of

deputy inspectors of grades, weights and measures to post a copy of this section in a conspicuous place in their respective places of business and to call the same to the attention of all persons dissatisfied with any decision.

Sec. 20. It shall be the duty of all deputy inspectors of grades, weights and measures to keep a record showing the name and addresses of patrons of their respective warehouses, elevators or mills; the prices paid for agricultural products; the grades given; the prices received and the grades received at terminal markets or within the State. This information shall be furnished the state inspector of grades, weights and measures upon written demand thereof.

Sec. 21. It shall be the duty of every deputy inspector of grades, weights and measures to provide proper sieves, cleaning devices for separating dockage from grain and seeds, grain tester, stroker and other tools used for the correct grading of grain and seeds.

Sec. 22. The proprietor, lessee or manager of any public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this State, and who does not pay cash in advance for the grain so bought shall file with the state inspector of grades, weights and measures a bond, to the State with good and sufficient sureties, to be approved by the inspector of grades, weights and measures in the penal sum of not less than five thousand dollars nor more than seventy-five thousand dollars, in the discretion of the state inspector of grades, weights and measures condi-

tioned for the faithful performance of their duties as public warehousemen and the compliance with all the laws of this State in relation thereto. Only one bond need be given for any line of elevators, mills or warehouses owned, controlled or operated by one individual, firm or corporation. Such bond shall specify the location of such elevator, mill or warehouse operated by such individual, firm or corporation, and shall be in an amount sufficient to protect the holders of the outstanding grain tickets.

Sec. 23. The state inspector of grades, weights and measures is hereby authorized, upon complaint of a producer of grain, seeds or other agricultural products that any warehouse, elevator or mill is paying an unreasonable margin, to investigate, determine and establish reasonable margin to be paid such producer for grain, seeds or other agricultural products.

Sec. 24. State inspector of grades, weights and measures, shall fix and determine the compensation and bonds of the chief deputy inspector of grades, weights and measures, the chief elevator accountant, state deputy inspector of grades, weights and measures, and warehouse inspectors.

Sec. 25. The chief elevator accountant and warehouse inspectors, under the direction of the state inspector of grades, weights and measures, shall visit the public warehouses in this state for the purpose of ascertaining whether sufficient bond is in force to protect the holders of storage tickets for grain stored therein; whether such warehouse is amply protected by insurance; to ad-

vise with local managers and boards of directors as to proper methods of accounting; to assist local warehouses in making proper reports and to secure annual or other reports required by law of the state inspector of grades, weights and measures and to advise and assist warehousemen in promoting efficiency and safety in the marketing of grain; to enforce compliance with all laws relating to public warehouses, and the rules and regulations of the state inspector of grades, weights and measures. Should such accountant or any inspector find that any such warehouse has failed to provide a bond sufficient to protect the holders of storage tickets or that such institution is not amply protected by insurance or has refused or neglected to furnish any report required by law or the state inspector of grades, weights and measures, or is violating any State law or the rules and regulations of the state inspector of grades, weights and measures relating to any such institutions, such inspector shall report such condition to the state inspector of grades, weights and measures, and to the manager of such institution. Should any such institution neglect or refuse to remedy such condition, the state inspector of grades, weights and measures may suspend the license of such warehouse and if after notice and the allowance of a reasonable time to comply with the instructions of the state inspector of grades, weights and measures, such warehouse refuses to remedy such conditions, the state inspector of grades, weights and measures shall cancel the license of such warehouse.

Sec. 26. A state warehouse license must be obtained through the state inspector of grades, weights and measures for each and every public grain warehouse in operation in this State. No license issued under this article shall describe more than one warehouse or grant permission to operate any other warehouse than the one therein described. The license fee is hereby fixed at eight dollars for warehouses of a capacity of 12,000 bushels or less and ten dollars for warehouses of a capacity of over 12,000 bushels and not to exceed 25,000 bushels, and twelve dollars for all warehouses over 25,000 bushels and not to exceed 50,000 bushels, and twenty dollars for all warehouses over 50,000 bushels and not to exceed 80,000 bushels capacity for each public grain warehouse. Before issuing any such license, the state inspector of grades, weights and measures shall collect from the person applying therefor the license fee required herein.

Sec. 27. The license thus obtained shall be posted in a conspicuous place in the public warehouse so licensed. Every such license shall expire on the first day of August of the odd numbered years next following the issuance thereof, and no license shall run for a longer period than two years. Any person or association that shall transact business of public warehousemen without first procuring a license as herein provided shall on conviction be fined in a sum of not less than twenty-five dollars for each and every day such business is carried on.

Sec. 28. The state inspector of grades, weights

and measures is hereby authorized to refund the license fee of a public grain warehouse or so much thereof as in his judgment would be just and reasonable when satisfactory proof is furnished to him that such warehouse or elevator has been transferred to some other person, firm or corporation and application is made by the owner for a license for the same warehouse or elevator for the same biennial period for which the original license was issued, provided, that where a warehouse or elevator is destroyed by fire or other cause, the license fee may be prorated in such amount as the state inspector of grades, weights and measures may determine.

Sec. 29. Any person violating any of the provisions of this Act shall be guilty of a misdemeanor, and for the first offense shall pay a fine of not less than $10.00 and not more than $100.00, or be confined in the county jail not less than ten days nor more than thirty days, or both such fine and imprisonment. For each succeeding offense he shall pay a fine of not less than $100.00 or more than $500.00 or be confined in the county jail not less than thirty days nor more than ninety days, or both such fine and imprisonment.

Sec. 30. Any person who forcibly assaults, resists, inmpedes or interferes with the state inspector of grades, weights and measures or any employee of the State of North Dakota in the execution of any duties authorized to be performed by this Act, shall upon conviction thereof be fined not less than $50.00 nor more than $100.00 or be confined in the county jail not less than fifteen

days or more than thirty days, or both such fine and imprisonment.

Sec. 31. All money in the State treasury known as the State grading and weighing fund are hereby appropriated for the purpose of carrying out the provisions of this Act, and shall be disbursed on vouchers issued by the State inspector of grades weights and measures. All fees and licenses collected by the state inspector of grades, weights and measures shall be turned into the state public grain grading and weighing fund, and the salaries and compensation of the state inspector of grades, weights and measures, chief deputy inspector of grades, weights and measures, chief elevator accountant, and all other deputies, inspectors, accountants, experts, clerks and employees, and all other expenses shall be paid out of this fund; provided such salaries, compensation and other expenses shall not exceed the sum of $35,000 per annum.

Sec. 32. The Sections 3101, 3102, 3103, 3105, 3109 and 3111 of the Compiled Laws of 1913 of the State of North Dakota, also Chapter 56 of the Laws of 1917 passed at the 15th session of the Legislative Assembly of the State of North Dakota, and Chapter 14 of the Laws passed at the Special Session of the 15th Legislative Assembly of the State of North Dakota for the year 1918, and all other Acts and parts of Acts in conflict with this Act are hereby repealed.

Sec. 33. Whereas there is no adequate provision of law providing for a uniform system of grading, weighing and inspecting grain in this

State therefore an emergency is hereby declared to exist, and this Act is hereby declared to be necessary for the immediate preservation of the public health, peace and safety and shall take effect and be in force from and after its passage and approval."

EXHIBIT "B".

Initiated Measure.

The North Dakota Grain Grading Act.

An act declaring the purpose of the State of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; providing for licensing buyers, solicitors and warehouses handling such farm products; and making an appropriation therefor.

Be it enacted by the people of the State of North Dakota:

Section 1. For the purpose of encouraging, promoting and safe-guarding agriculture, commerce and industry, and preventing confiscation of dockage, unjust discrimination, fraud and extortion in marketing of all kinds of grain, seed and other agricultural products, we, the people of the State of North Dakota, do hereby establish a uniform system of grading, weighing and measuring all kinds of grain, seed and other farm products, and this act shall be known as the "North Dakota Grain Grading Act."

Section II. The board of railroad commissioners of the State, on or before the 8th day of December, 1922, shall appoint for a term of four years, a supervisor of grades, weights and measures, who shall be an expert in the grading, weigh-

ing and measuring of all kinds of grain, seeds and other agricultural products; and such supervisor shall immediately assume the duties of his office and shall receive a salary of $3600 per annum. In case of death, resignation or inability of such supervisor, the vacancy shall be filled in like manner for the unexpired term, and thereafter such supervisor shall be appointed in like manner.

Section III. The state supervisor of grades, weights and measures shall maintain his office and principal place of business at the Agricultural College of this State, and shall make and enforce such orders, rules and regulations as are necessary to carry out the provisions of this act. It is hereby made the duty of all of the departments of the Agricultural College, (and especially of the State experiment mill at said College), to assist and co-operate with the state supervisor of grades, weights and measures in analyzing and testing all kinds of grain, seeds and other farm products for the purpose of establishing just and uniform grades, weights and measures for same.

Section IV. It shall be the duty of the state supervisor of grades, weights and measures to fix and establish as soon as may be after the enactment hereof for the purpose of preventing fraud and wrongful handling of grain, seed and other farm products, and protecting the producers of the same in connection with the marketing thereof, grades, weights and measures for all kinds of grain, seed and other farm products and he shall prescribe standards of quality and conditions of same, and shall in a general way investigate and

supervise the marketing of same with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage, fraud and other unlawful practices; provided however that whenever the secretary of agriculture of the United States has established grades, weights and measures, or any standards of quality and condition of any grain, seed and other agricultural products under the United States Grain Standards Act, such grades, standards of quality and condition, weights and measures shall become the grades, standards of quality and conditions, weights and measures of this State. In establishing such grades, weights and measures, the value of dockage shall be considered and the buyer shall not be permitted to retain same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer.

Section V. That whenever grades, weights and measures shall have been fixed and established under the provisions of this act for any grain, seed or agricultural products by the state supervisor of grades, weights and measures, or by the secretary of agriculture of the United States, then no person thereafter shall buy by grade any such farm product unless it shall have been inspected and graded by an inspector licensed under the provisions of this act, or under the provisions of the United States Grain Standards Act, and the grade by which it is bought be one of the grades fixed and recognized under the provisions of this act; provided, that any person may buy any such pro-

duct by sample or by type or under any name, description or designation which is not false or misleading and which name, description or designation does not include in whole or part the terms of any official grade or grain standard established or recognized by this act. Nothing herein shall prohibit producers from buying grain, seed or other agricultural products from one another.

Section VI. The state supervisor of grades, weights and measures shall issue a license to grade to any person engaged in soliciting, buying, weighing and inspecting or grading grain, seeds or other agricultural products, or to the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill handling agricultural products, provided that such buyers, solicitor or agent shall pass such reasonable examination as to his competency as may be prescribed by the state supervisor of grades, weights and measures. The condition of such license shall require such person to honestly and correctly fix grades and dockage of grain and seed inspected at their respective places of business and to honestly and correctly weigh the products so inspected and graded, according to the provisions of this act and the rules and regulations made hereunder.

Section VII. The state supervisor of grades, weights and measures may suspend or revoke any license issued by him under this act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has short-weighted or has taken for his own use valuable dockage

without compensation. or has issued any false certificate of grading or has violated any of the provisions of this act or of the United States Grain Standards Act. Upon such suspension or revocation, if the licensee is not satisfied with the decision of the state supervisor of grades, weights and measures, he may appeal to the District Court of his county and have such an order reviewed. All licenses issued under this section shall terminate on the 30th day of June each year. Each person receiving such license shall cause same to be conspicuously posted at his place of business, provided that any person may without a license and according to provisions of the United States Grain Standards Act and the rules and regulations promulgated thereunder by the secretary of agriculture, buy by grade any grain, seed or other agricultural products that have been graded as provided by this act.

Section VIII. A state warehouse license must be obtained through the state supervisor of grades, weights and measures for each and every public warehouse handling grain, seed or other farm products in the state. License fee for such warehouse to be fixed by the state supervisor of grades. weights and measures, and shall not exceed $1.00 for each 1000 bushels capacity of such warehouse. The license thus obtained shall be posted in a conspicuous place in such warehouse and shall expire on the 30th day of June each year following the issuance thereof.

Section IX. It shall be the duty of the supervisor of grades, weights and measures to inspect

public warehouses handling grain, seed or other farm products and to establish and alter rules and regulations for handling, storing, weighing, grading and inspecting such farm products and he shall require the proprietor, lessee or manager of of any such public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this state, who does not pay cash in advance for the grain so bought, to file with him a bond, running to the State, with good and sufficient surety in an amount sufficient to cover the value of all farm products bought and not paid for in cash and in addition thereto, he shall require a bond from such public warehouse in a penal sum of not less than five thousand dollars, as in his discretion he may deem fit for the faithful performance of their duties as public warehousemen, and the compliance with all of the laws of this State in relation thereto.

Section X. And it shall be the duty of every public warehouseman in this State to keep a record of the names and addresses of their respective warehouses, elevators or mills; the price paid for agricultural products, the grades given; the price received and the grades received at the terminal markets or within the state, which information shall be furnished to the supervisor of grades, weights and measures upon written request.

Section XI. In case of any dispute as to grades, weights or measures, between the producer and the purchaser, operating a public warehouse, elevator or flour mill, handling agricultural products, then a sample shall be taken from such farm product,

and shall be sent to the supervisor of grades, weights and measures, and the proper grade, weight or measure shall be determined by him under such rules and regulations as he may establish.

Section XII. It shall be unlawful for any person to grade grain, seed or other agricultural products who has not been licensed by the supervisor of grades, weights and measures or who does not hold a license to grade, weigh or measure grain, seed or other agricultural products under the United States Grain Standards Act. And it shall be unlawful for any person or persons corporation or association to operate a public warehouse, or to grade grain, seed or other agricultural products without first securing a license from the supervisor of grades, weights and measures, provided, however, that this section shall not prohibit any such person from buying such agricultural products if they have first been lawfully graded or provided he buys them by samples as otherwise provided for herein.

Section XIII. To accomplish the purpose of this act, the state supervisor of grades, weights and measures may employ such deputies, assistants, accountants, expert agents and servants as in his judgment he deems necessary, and he shall define the duties and designate the titles and fix the compensation and bonds of such persons so engaged, the total compensation of such appointees and employees, together with the other expenditures for the operation and maintenance of the department of grain grading, shall remain within

the appropriation and the funds received from the licensing of elevators, warehouses and mills handling agricultural products available each year for such purpose; and the supervisor of grades, weights and measures may remove any such deputies, assistants, accountants, expert agents and servants whenever in his judgment the public interests require it, and he may do any and all such other acts as are necessary to carry out any and all of the provisions of this act. And it shall be the duty of the attorney general of the state and his assistants and all of the states' attorneys of the various counties of the state to prosecute any violations of any of the provisions of this act upon complaint made to them in writing by the state supervisor of grades, weights and measures.

Section XIV. The salary of the supervisor of grades, weights and measures shall be paid out of the grain grading fund, and he shall give bond to the State in the sum of ten thousand dollars.

Section XV. Any person who assaults or in any way resists any officer or employee of the North Dakota grain grading department in the execution of his duties, or who violates any of the provisions of this act shall be guilty of a misdemeanor.

Section XVI. There is hereby appropriated for the purpose of carrying out the provisions of this act out of any of the general funds of the state treasury, the sum of ten thousand dollars, together with all moneys in the state treasury known as the State Grain Grading Fund, and all fees for licenses collected under the provisions of this act

shall be turned into the state treasury and designated as the North Dakota Grain Grading Fund, and when so turned in and designated, it shall be appropriated and available for the purpose of carrying out all of the provisions of this act.

Section XVII. All of the duties and obligations which were formerly performed by the state inspector of grades, weights and measures, and all of the obligations placed upon him by law, are hereby transferred and made part of the duties of the supervisor of grades, weights and measures; and all acts or parts of acts in conflict with any of the provisions of this act are hereby expressly repealed.

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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 34.

GEORGE F. SHAFER, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND FRANK MILHOLLAN, C. W. MCDONNELL AND FAY HARDING AS THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, *Appellants,*

vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

APPELLANTS' BRIEF ON RE-ARGUMENT.

GEORGE F. SHAFER,
Attorney General,
SETH W. RICHARDSON,
Special Assistant Attorney General,
Attorneys for Appellants.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

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APPELLANTS' BRIEF ON RE-ARGUMENT.

This cause was set down for re-argument by this court on March 2, 1925. No request was made for the submission of additional or supplementary briefs. On March 2nd we were presented in the Supreme Court with a brief entitled "Appellees' Brief on Re-hearing." We had no opportunity to

examine the same or to prepare any reply with reference thereto.

This additional memorandum is, therefore, prepared and submitted for the attention of the court in connection with the brief submitted by the appellees upon such re-argument. In referring, therefore, hereafter to appellees' brief reference is had to such brief upon the re-argument.

1.

Throughout such brief it is apparent that the plaintiffs have laid the greatest possible stress upon the preamble preceding the North Dakota Grain Grading Act of 1922. An attempt is made to convince the court that the language used in such preamble, is in some not clearly understood way, controlling upon the actual provisions of the act itself. It may be freely admitted that such preamble, which is in general inclusive terms, may seem broader than the provisions of the act itself. Our contention on the point is simply that the provisions of the act should in every case control as to determining the powers and scope of the act and that general recitals in a preamble to the act can neither amplify or narrow the powers provided for in the actual act itself.

2.

Much of appellees' brief is devoted to a claim that the grain business requires a uniform rule and that the provisions of the North Dakota Act

in question prevents the application of such uniform rule. Our contention is exactly the opposite. It is the condition of affairs which the plaintiffs wish perpetuated which destroys the uniformity of rule deemed necessary. Uniformity of rule simply means the providing of a definite, uniform measure for the establishment of the grades of grain. This uniform rule is established by the United States Grain Standards Act and the grades thus established having been made a part of the North Dakota Act the rule is the same covering the entire grain business under both laws. The uniform rule sought for is, therefore, established.

On the other hand, in the absence of the North Dakota Law, the state contends that the grades provided for under the United States Grain Standards Act are *not* being given to the producers at the local markets even if the grain at that point be considered to be in interstate commerce. In other words, it is claimed that under present conditions the farmer cannot obtain accurate United States Standard grades at the local markets through the nonfeasance or actual misfeasance of the persons now grading grain at such local points, The conclusion of the state and its officers that such evils exist are not properly the subject of review by this court on this appeal. We believe the proper rule requires this court to accept the decision of the state as to the fact with respect to the existence of such evils. Under present practices, therefore, there is no uniform rule actually applied in the grain business—a result directly caused by

the failure of the persons now grading grain at local elevator points to observe the directions of the United States Grain Standards Act. Such a condition, therefore, directly prevents the application of the uniform rule sought for so vigorously in appellees' argument.

In the next place, it is clear that the claim of the appellees that the existence of the State Act results in a dual inspection is equally erroneous. There is and always will be necessarily, with reference to the overwhelming majority of grain sold and purchased by grade, *two* inspections. The grain must be inspected and graded before the original purchase can take place. This is the *first* inspection. Then, at the terminal, the grain must be again inspected and graded before, or in connection with sale. This is the *second* inspection and grading. From the very nature of the case there *must always be a dual inspection of the grain.* Under the terms of the United States Grain Standards Act, under each grading and inspection, the uniform rule of grading fixed by the act is supposed to be applied. All that the State Act does is not to increase the *number* of inspections, but simply adds safeguards for the purpose of making more certain that the *first* necessary inspection shall be of the kind and character promised and fixed by the terms of the United States Grain Standards Act. The claim of the appellees that such a supervision results in a dual inspection is absurd. The *number* of inspections always remains the same, and if at the local market the persons grading

grain are really complying with the Federal Act, the supervision under the provisions of the State Act creates no additional burden. On the other hand, if such persons are not now obeying the provisions of the Federal Act, certainly the provisions of that Act or the constitutional privisions with reference to the control of interstate commerce, ought not to serve as a shield to protect them in such wrongdoing.

Nor does the contention of the appellees that the result of state supervision of grading where there is no opportunity or means provided for federal inspection of such grading, will result in an appeal to *divergent* authority, stand upon any firmer ground. In Section 7 of the United States Grain Standards Act (39 Statutes at Large 482) it is specifically provided that federal licenses shall be issued to state inspectors operating under state inspection and grading systems. The North Dakota Act here in question in Section 2 provides for the appointment of a supervisor. This supervisor is by the terms of Section 7 of the Federal Act entirely qualified as a federal inspector. In event of a dispute as provided in Section 11 of the North Dakota Law an appeal may be had to such state supervisor. It must at all times be kept in mind that such supervisor is also a federal inspector. Such appeal, therefore, not only goes to the state supervisor, *but also to a federal inspector,* and the ruling of the person who is both state supervisor and federal inspector provides an ample basis for the ultimate submission of his ruling to the sec-

retary of agriculture under the United States Grain Standards Act, because an appeal will lie from such federal inspector under the provisions of the Federal Act ultimately to the secretary of agriculture.

This point illustrates aptly the real co-operation between the Federal and State Acts and the utter absence of interference or friction. The uniting of the superior executive officer under both acts in the same person, shows clearly that the existence of the State Act helps and assists in the accomplishing of the uniform rule apparently so much sought for by these plaintiffs.

3.

We are somewhat at a loss to explain the amount of attention given to certain alleged acts of Senator Ladd with respect to certain bills introduced in congress, except upon the basis of raising possible political prejudice. The evident desire of the senator to fix a specific point where interstate commerce in grain might begin, was undoubtedly premised upon the actual fact that this court has itself stated that it was in very great doubt as to just where that point existed. Of course, upon reflection, the action had in Congress, and referred to so frequently by appellees, could have no proper application to the determination of this appeal, other than the possible reason above stated.

4.

It is suggested with some force that the intention of the Federal Act implies a desire to have inspectors who are disinterested and not connected with the grain business, commercially. It is then suggested that if the Federal Act should be amended so that inspectors at local points might be so commercially interested, such amendment might be interpreted as a reversal of policy on the part of congress. We do not believe that such a suggestion is sound. The fact that the Federal Act requires disinterested inspectors was at once interpreted by the secretary of agriculture to mean that federal inspectors should be supplied only at *terminal points,* for the obvious reason that it could not be fairly supposed that Congress intended to create some twenty-two hundred independent inspectors to cover the local market situation in North Dakota. The policy of Congress, therefore, as indicated by such a law was that the congressional legislation should occupy a *limited field,* to-wit, the field at the terminal, but that such legislation would not be exclusive and would not cover the actual inspection at local points. If, therefore, Congress by amending the act should itself provide for adequate inspection at the local elevator points through the use of interested inspectors, the reversal of policy would simply mean that Congress by such a new enactment *was intending to occupy both fields,* to-wit, the terminal field and the local markets in North Dakota. The very fact, there-

fore, that a reasonable construction of the Federal Act prevents the presence of federal inspectors in North Dakota demonstrates, it seems to us, that the Federal Act was not intended to be exclusive but was intended only to occupy a part of the field.

5.

Much attention is paid in appellees' brief to the requirement of Section 9 that a bond should be given by persons buying grain on credit. Properly considered, we do not think that such clause should present any difficulty to the court. In the first place, it is an entirely separable clause and the question of its validity or invalidity should have no effect upon the validity or invalidity of the general act itself.

In the second place we think it improper to reduce the situation to an individual transaction. It is suggested that for the state to require a bond from an individual buyer of grain on credit, where such transaction is satisfactory to his immediate vendor, is burdening interstate commerce. We do not think such a suggestion is fair. Where a multitude of such transactions result in a situation where a large number of the people of the state are victimized and defrauded of their just dues and the prosperity and welfare of the state is thereby jeopardized, we think the rights of the individual transaction should be subject to the protection of the general welfare of the greater number of people of the state. If the buying of grain on credit

has resulted in the disasters claimed, is it unreasonable to suggest that the state under its police power may interfere to prevent such a catastrophe, even if the means employed may indirectly affect interstate commerce? Must not the question of individual right yield necessarily to the general protection of the welfare of all of the people?

After all, what is the distinction between such a bond, and the bond ordinarily required from elevators and warehouses? It is recognized that the conduct of an elevator or warehouse is something which may vitally affect the prosperity of the state. The reasons for such conclusion are clearly set forth in the Cargill case (180 U. S. 452). The bond is for the purpose of protecting the general interests of the people, who by reason of the course of business must necessarily deal with elevators and warehouses. If an *individual* is engaged in the same general business, to-wit, the handling of grain, is there any reason why the same bond requirement should not be made of the individual that may concededly be made from an elevator or warehouse operator, and what difference does it make that there may be a general bond covering warehouses, and a special bond required in connection with the purchase of grain on credit? In either case, the bond is for the *protection of the people,* and it must be admitted that the need for protection in connection with the *purchase of grain on credit* is fully as great, if not greater, than the necessity of a bond in connection with *stored grain.* The operations, therefore, of the persons interested being the same,

the general purpose being the same, and the ultimate object of the bond being the same, what reasonable distinction can be made between the right to require an elevator or warehouse bond and the bond provided for in Section 9?

6.

It is further contended that the provision of the North Dakota Act, Section 4, with respect to dockage constitutes a direct interference with interstate commerce. It must be conceded, so far as this argument is concerned, that in the absence of such a clause the farmer has been deprived of his valuable dockage, and the benefit thereof has gone to the purchaser of the grain. It must also be admitted that the taking of this dockage without compensation is with the opposition of the farmer and over his objection. *We have a situation, therefore, where the buyer of grain is actually appropriating a certain portion of the farmer's product without compensation.* Can the interstate commerce clause be used as a shield for such a transaction? In *House v. Mayes,* 218 U. S. 207, this court held that the due process of law provision of the constitution would not protect the buyer of grain in Missouri in appropriating an arbitrary portion of the grain without payment and that such appropriation was in effect a taking of the farmers' property without due process of law. It has been frequently suggested by this court that the interstate commerce clause will not be permitted to shield or encourage

fraud. What other effect can the objection raised by the appellees on this point have, than to encourage and protect fraud? These plaintiffs are now appropriating this valuable dockage without compensation. They ask the assistance of this court in continuing such illegal practice. Should such protection be extended to them under the interstate commerce clause?

It is frequently suggested in appellees' brief, although there is no evidence in the record whatever on the point, that at one time a finding of a Federal Commission indicated that grain was overgraded at the local elevator point and that, therefore, the evils complained of by the state authorities did not exist. Concerning this suggestion we have this to say: In the first place, a vote of three to one in favor of the passage of the North Dakota law now in question shows that the people of North Dakota did not believe that the alleged situation reported by such commission in fact existed, but that on the other hand grain was being constantly undergraded at the local elevator point. In the second place it will be conceded that the North Dakota law is being most vigorously fought by the terminal elevator companies. If, as a matter of fact, grain was being overgraded at the local elevator points, the existence of careful inspection under the federal grades at the local point would tend to equalize such difference, *a result wholly favorable to these plaintiffs.* If the plaintiffs, therefore, were sincere in making this claim of overgrading at local elevator points, the curing of such evil should be

most acceptable to these plaintiffs, and their opposition to the law cannot possibly be explained upon the abstract theory of defending the principle of interstate commerce. The attack upon this law is a most convincing argument that the actual conditions support the claim of the state as to existing evils.

7.

A most patent attempt is made throughout appellees' brief to point out to this court that the act under consideration is an act prepared and adopted in defiance of the opinion of this court in the Lemke case. The idea probably is to arouse the indignation of this court against what is claimed to be a "brazen" attempt to evade its opinion in that case. With all the sincerity which we may express, we urge upon the court the falseness of such a proposition. We are indeed anxious to preserve for the state all of its rights to help improve conditions affecting the grain business. We do not understand that the court intended under the Lemke decision to state that the state had no power in helping to better the present grievous conditions. Our interpretation of the Lemke decision is simply that the state, by including in its act *the control of margins*, and, therefore, the actual control of prices, went beyond the police power and attempted to regulate and control, directly, interstate commerce. We have always very much doubted whether the law in the Lemke case would have been declared unconstitutional if the margin clause had

not been included in that act. *It was the inclusion of such clause which permitted the court to say that the act was a comprehensive scheme to control the buying of grain.* Without such margin clause we do not believe even that the former law constituted such a comprehensive scheme. When, therefore, as we contend, a new act is drawn which everywhere recognizes the supremacy of the federal authority, recognizes the right of federal inspectors in all particulars and provides for the administration of the act by a supervisor who is by virtue of his position also to be an inspector under the Federal Act, may we not fairly say that we have changed both the purpose, the scope and the legal relations affecting the entire situation? This result, therefore, is brought before this court in the form of the 1922 law as an earnest, sincere attempt on the part of the state to properly and legally help in the protection of its own welfare and that of its citizens.

8.

Finally, we believe the present North Dakota Act should be considered broadly and with a view to its actual effect. After all, all that the act does is to assist in making certain that the grades fixed under the United States Grain Standards Act *will actually be put in force at the local elevator point.* At present there is no local inspection; at present the farmer must take the prejudiced judgment of the employes of these plaintiffs. There is no way of knowing whether these employes are actually

giving the grades provided for in the Federal Act because by the time the grain reaches the terminals where there are federal inspectors the farmer no longer owns the grain and has no lawful interest in it. These plaintiffs, interested parties, desire to perpetuate such a condition. Is it unreasonable for the state, although recognizing the supremacy of the Federal Act, although approving in detail every right of a federal inspector, we repeat, is it unreasonable where there are no federal inspectors and where, under an intelligent construction of the Federal Act there never can be any federal inspectors, for the state to step in under the police power and bring some necessarily slight pressure to bear in order that the rights conferred by the United States Grain Standards Act may be actually received throughout the state of North Dakota? If Florida may say that no fruit can be shipped outside the state where in the opinion of the state it is unfit for human food—if the state of Louisiana may provide that no coke may be sold in the state of Louisiana until it passes under state inspection and supervision—if Ohio may provide that no securi ties may be sold, even though in interstate commerce, unless the person selling has a state license permitting him to sell—if under these illustrations and the multitude of other illustrations of similar purport where State Acts have been sustained such laws shall have been found by this court to be properly within the police power and not properly regulations of interstate commerce, why should the action of the state of North Dakota in simply en-

deavoring to make certain that only properly qualified persons may grade grain, be made the subject of an adverse holding from this court? We submit that there is no proper legal reason why the decision of this court in the Cargill case cited above is not in all respects applicable to the decision of this case. The provisions of the Minnesota Law in the Cargill case were much more burdensome and detailed than are the provisions of the present law. We invite the attention of the court to the recitals of that law as contained in the opinion of the court in the Cargill case. Can it be properly said that such a law was not in every respect more actually burdensome upon interstate commerce than the law now before the court?

9.

The points raised by appellees as to claimed conflicts between the North Dakota Act and the United States Grain Standards Act are discussed in our original brief. We believe that the construction which we there suggest offers a method of avoiding any conflict between the two acts, the rule being that any reasonable construction should be adopted which would avoid a claimed conflict.

10.

In conclusion, therefore, we think that a fair analysis of the law will demonstrate that it is essentially and legally different from the act held unconstitutional in the Lemke case.

We think that it is in no way in conflict with the United States Grain Standards Act but is by the terms of such Federal Act, the interpretation placed thereon by the secretary of agriculture and the characterization of such act by decisions of this court, wholly co-operative with the Federal Act.

We think that the construction of Section 17 of the North Dakota Act sought for by the appellees is neither proper nor reasonable and that a proper construction of such section shows that there was no intention of attempting to clothe the supervisor with powers previously held unconstitutional in the Lemke case and that in any event the provisions of Section 17 are in nowise vital to the present act and should be so construed.

Respectfully submitted,

GEORGE F. SHAFER,
Attorney General,
SETH W. RICHARDSON,
Special Assistant Attorney General,
Attorneys for Appellants.